

March 7, 2006

AO DRAFT COMMENT PROCEDURES

The Commission permits the submission of written public comments on draft advisory opinions when proposed by the Office of General Counsel and scheduled for a future Commission agenda.

Today, DRAFT ADVISORY OPINION 2006-06 is available for public comments under this procedure. It was requested by, Brandon Hall, Campaign Manager on behalf of Francine Busby for Congress.

Proposed Advisory Opinion 2006-06 is scheduled to be on the Commission's agenda for its public meeting of Thursday, March 9, 2006.

Please note the following requirements for submitting comments:

1) Comments must be submitted in writing to the Commission Secretary with a duplicate copy to the Office of General Counsel. Comments in legible and complete form may be submitted by fax machine to the Secretary at (202) 208-3333 and to OGC at (202) 219-3923.

2) The deadline for the submission of comments is 12:00 noon (Eastern Time) on March 8, 2006.

3) No comments will be accepted or considered if received after the deadline. Late comments will be rejected and returned to the commenter. Requests to extend the comment period are discouraged and unwelcome. An extension request will be considered only if received before the comment deadline and then only on a case-by-case basis in special circumstances.

4) All timely received comments will be distributed to the Commission and the Office of General Counsel. They will also be made available to the public at the Commission's Public Records Office.

CONTACTS

Press inquiries: Robert Biersack (202) 694-1220

Commission Secretary: Mary Dove (202) 694-1040

Other inquiries:

To obtain copies of documents related to AO 2006-06, contact the Public Records Office at (202) 694-1120 or (800) 424-9530.

For questions about comment submission procedures, contact Rosemary C. Smith, Associate General Counsel, at (202) 694-1650.

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FEDERAL ELECTION COMMISSION
Washington, DC 20463

March 7, 2006

MEMORANDUM

TO: The Commission

THROUGH: Robert J. Costa
Acting Staff Director

FROM: Lawrence H. Norton
General Counsel

Rosemary C. Smith
Associate General Counsel

Mai T. Dinh
Assistant General Counsel

Robert M. Knop
Attorney

Subject: Draft AO 2006-06

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for March 9, 2006.

Attachment

1 ADVISORY OPINION 2006-06

2
3 Mr. Brandon Hall
4 Campaign Manager
5 Busby for Congress
6 P.O. Box 712
7 Cardiff by the Sea, CA 92007

DRAFT

8
9 Dear Mr. Hall:

10
11 We are responding to your advisory opinion request on behalf of Francine Busby
12 for Congress (“the Committee”) concerning the application of the Federal Election
13 Campaign Act of 1971, as amended (“the Act”), and Commission regulations to the
14 upcoming special general election in California’s 50th Congressional District. Because
15 Ms. Busby is participating in the special general election, all expenditures from personal
16 funds that she or her opponent(s) in the special general election made or make between
17 November 3, 2004 and April 11, 2006, must be aggregated as expenditures for the special
18 general election, for Millionaires’ Amendment purposes. The application of the
19 Millionaires’ Amendment provisions between April 12, 2006 and June 6, 2006 vary
20 depending on whether there are two elections on June 6, 2006 or just one, as discussed in
21 greater detail below.

22 ***Background***

23 The facts presented in this advisory opinion are based on your letter received on
24 February 14, 2006.

25 The Committee is the principal campaign committee of Francine Busby, a
26 candidate for Congress in California’s 50th Congressional District. She is a candidate
27 both in the special general election to replace former Congressman Randy “Duke”
28 Cunningham for the remainder of the 109th Congress (“Special General Election”), and in

the regular primary election to nominate a Democratic Party candidate for the same seat in the 110th Congress (“Primary Election”).

Under California law, the Special General Election will be held on April 11, 2006. That election is open to all qualified candidates, regardless of party affiliation. If a candidate receives a majority of the votes cast, he or she will be declared the winner. If no candidate receives a majority of the votes cast, then a runoff election will be held among the top vote-getters of each qualified political party. At present, two Democratic candidates, fourteen Republican candidates, one Libertarian candidate, and one Independent candidate are on the ballot in the Special General Election.

Should a runoff election (“Special General Runoff”) be required, it will be held on June 6, 2006 – the same day as the Primary Election. Unlike the Special General Election, in the Primary Election the candidates of each political party are only running against each other for their party’s nomination. Most, if not all, of the candidates currently running in the Special General Election are also running in the Primary Election for their respective political party’s nomination.

Question Presented

How do the provisions of the Millionaires’ Amendment apply to the April 11, 2006, Special General Election and the June 6, 2006, Primary Election in California’s 50th Congressional District?

Legal Analysis and Conclusions

On November 6, 2002, the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002) (“BCRA”) took effect. As amended by BCRA, the Act contains a set of provisions collectively referred to as the “Millionaires’ Amendment.” See 2 U.S.C. 441a(i) and 441a-1. The Millionaires’ Amendment provisions applicable to elections for the United States House of Representatives are set forth in 2 U.S.C. 441a-1.¹ See, e.g., 11 CFR 400.21(b), 400.31(e), and 400.41.

Under the Millionaires’ Amendment, candidates may solicit, receive, and spend contributions from individuals exceeding the contribution limit in 2 U.S.C. 441a(a)(1)(A) if they are running against self-financed candidates who make expenditures from their personal funds that exceed certain amounts. See 2 U.S.C. 441a-1(a)(1)(A) and 11 CFR 400.41(b)(1). Additionally, national and State party committees may make coordinated party expenditures in excess of the normally applicable coordinated party expenditure limit, in 2 U.S.C. 441a(d), on behalf of candidates opposing self-financed candidates. See 2 U.S.C. 441a-1(a)(1)(C) and 11 CFR 400.41(b)(2). The Millionaires’ Amendment also requires candidates and/or their principal campaign committees to comply with a number of new reporting and notification requirements. See, e.g., 2 U.S.C. 441a-1(b) and 11 CFR 400.20, 400.21, 400.22, and 400.30(b)(2).

The provisions of the Millionaires’ Amendment apply separately to each election cycle. See 2 U.S.C. 431(25) and 11 CFR 400.2(a). For Millionaires’ Amendment

¹ The Millionaires’ Amendment contains separate provisions for candidates for the U.S. House of Representatives and candidates for the U.S. Senate. Because you are a candidate for the U.S. House of Representatives, this advisory opinion refers only to the provisions that address candidates for the U.S. House of Representatives.

1 purposes, an “election cycle” is defined as the period beginning on the day after the date
2 of the most recent election for the specific office or seat that a candidate is seeking and
3 ending on the date of the next election for that office or seat. *Id.* Primary elections and
4 general elections are considered to have separate election cycles and a runoff election is
5 considered to be the end of the election cycle for the election that necessitated the runoff.
6 *Id.*

7 An expenditure from personal funds² made during a particular election cycle is
8 made for the purpose of influencing that election, unless designated for a different
9 election campaign on FEC Form 3Z-1. *See* 11 CFR 104.19. An expenditure from
10 personal funds is considered made on the date the funds are deposited into the account
11 designated by the candidate’s authorized committee as the campaign depository, under 11
12 CFR 103.1 and 103.2, on the date the instrument transferring the funds is signed, or on
13 the date the contract obligating the personal funds is executed, whichever is earlier. 11
14 CFR 400.4(b).

15 The definitions of “election cycle” in the Act and Commission regulations do not
16 specifically refer to a special election. However, under the plain language of those
17 definitions, the time period before a special election is a separate election cycle. Thus,
18 for the purposes of applying the Millionaires’ Amendment, the Special General Election
19 Cycle began on November 3, 2004, the day after the last general election, and will end on
20 April 11, 2006. If no winner is declared in that election, necessitating the Special

² “Expenditure from personal funds” is the aggregate amount of all election-related expenditures and contributions made from the candidate’s personal funds, all loans made or secured with the candidate’s personal funds, and all legally enforceable obligations to make expenditures from the candidate’s personal funds. *See* 11 CFR 400.4 for definition of “expenditure from personal funds.” *See also* 2 U.S.C. 441a-1(b)(1)(A).

1 General Runoff, the election cycle began on November 3, 2004, and ends on June 6,
2 2006, for candidates participating in the Special General Runoff. Consequently, for the
3 purposes of the Millionaires' Amendment, the Primary Election Cycle commences on
4 April 12, 2006, the day after the Special General Election, and ends on June 6, 2006, the
5 date of the Primary Election.

6 The discussion below describes how the Millionaires' Amendment and
7 Commission regulations apply during these two election cycles. Although Ms. Busby has
8 not made any expenditures from personal funds to date, the discussion below includes
9 analyses that assume she makes expenditures from personal funds and/or runs against a
10 candidate who makes expenditures from personal funds.

11 *Special General Election Cycle: November 3, 2004 – April 11, 2006*

12 Candidates participating in the Special General Election must aggregate all
13 expenditures from personal funds made during the Special General Election Cycle.
14 Those expenditures are considered expenditures for the Special General Election and
15 cannot be designated for the Primary Election. Thus, if Ms. Busby's total expenditures
16 from personal funds exceed \$350,000 anytime before April 11, 2006, the Committee
17 must, within 24 hours, file with the Commission an Initial Notification of Expenditures
18 from Personal Funds ("Initial Notification") on FEC Form 10. *See* 11 CFR 400.21(b) and
19 400.24(b). The Committee must also send a copy of this form to *all* candidates running
20 in the Special General Election and to the national party committees of those candidates.
21 *See id.* After filing an Initial Notification, every time Ms. Busby's expenditures from
22 personal funds aggregate in excess of \$10,000, the Committee must, within 24 hours, file

1 with the Commission an Additional Notification of Expenditures from Personal Funds
2 (“Additional Notification”) on FEC Form 10 and send a copy of this form to those who
3 received copies of the Initial Notification. *See* 11 CFR 400.22(b) and 400.24(b).
4 Because during this timeframe Ms. Busby is only in the Special General Election Cycle,
5 Ms. Busby and the Committee are not required to send a copy of FEC Form 10 to any
6 opposing candidates in the Primary Election or to their national party committees, unless
7 those opposing candidates are also participating in the Special General Election.³

8 If the Committee receives a copy of FEC Form 10 filed by one of Ms. Busby’s
9 opponents in the Special General Election before April 11, 2006, the Committee must
10 calculate the “opposition personal funds amount” to determine whether it qualifies for
11 increased individual contributions and increased coordinated party expenditures. *See* 11
12 CFR 400.30(b)(1) and 400.10 (defining “opposition personal funds amount”). The
13 Committee may also obtain constructive notification of the FEC Form 10 by
14 downloading the form from the FEC’s website. *See* 11 CFR 400.30(b)(1) and (d). If any
15 of Ms. Busby’s opponents in the Special General Election files an FEC Form 10 with the
16 Commission during the Special General Election Cycle and designates the expenditure as
17 in connection with the Primary Election, the expenditure will still be considered an
18 expenditure for the Special General Election regardless of the opposing candidate’s

³ The relevant election cycle for candidates participating only in the Primary Election (*i.e.* who are not running in the Special General Election) began on November 3, 2004 and ends on June 6, 2006. During the Special General Election Cycle, candidates participating *only* in the Primary Election should aggregate all expenditures from personal funds and, if those expenditures aggregate in excess of \$350,000 prior to April 11, 2006, they should file FEC Form 10 with the Commission and send copies of that form to all opposing candidates who are also *only* participating in the Primary Election as well as to the national party committees of those candidates. Candidates participating only in the Primary Election should not send a copy of FEC Form 10 to any candidates participating in the Special General Election prior to April 12, 2006.

1 designation. Thus, Ms. Busby or the Committee may download that FEC Form 10 (if
2 they have not received it) and treat it as filed for the Special General Election.

3 In calculating the opposition personal funds amount, the Committee would
4 normally take into account the gross receipts advantage as determined using the FEC
5 Form 3Z-1 filed by each candidate in his or her 2005 Year End Report. *See* 11 CFR
6 400.10(a)(3). However, FEC Form 3Z-1 does not provide information regarding gross
7 receipts with respect to special elections. Thus, the Committee should not include the
8 gross receipts amounts in calculating the opposition personal funds amount for the
9 Special General Election Cycle. Consequently, the Committee will calculate the
10 opposition personal funds amount as follows: the opposing candidate's aggregate
11 expenditures from personal funds as of the date of calculation minus Ms. Busby's
12 aggregate expenditures from personal funds as of the date of calculation. If the
13 opposition personal funds amount makes the Committee eligible for increased
14 coordinated party expenditures, the Committee must file FEC Form 11 with the
15 Commission and with Ms. Busby's national and State party committees within 24 hours
16 of receiving the FEC Form 10. *See* 11 CFR 400.30(b)(2).

17 If the Committee determines that it is eligible to receive increased individual
18 contributions, it may begin soliciting contributions up to \$6,300 per individual
19 contributor (three times the current individual contribution limit of \$2,100) for use only
20 during the Special General Election Cycle. *See* 2 U.S.C. 441a-1(a)(1)(A) and 11 CFR
21 400.41. The Committee must stop accepting such increased contributions during the
22 Special General Election Cycle, however, if: (1) it reaches the proportionality provision

1 limit;⁴ (2) Ms. Busby's own expenditures from personal funds make her ineligible for
2 increased limits; or (3) the opposing candidate whose expenditures from personal funds
3 entitled the Committee to receive increased contributions ceases to be a candidate and no
4 other opposing candidate remaining in the Special General Election has made sufficient
5 expenditures from personal funds to entitle the Committee to continue accepting
6 increased contributions. *See* 2 U.S.C. 441a-1(a)(1) and (a)(3); 11 CFR 400.31 and
7 400.32.

8 The manner in which the provisions of the Millionaires' Amendment will apply
9 between April 12, 2006 and June 6, 2006, depends on the outcome of the Special General
10 Election. If one candidate receives a majority of the votes on April 11, 2006, then no
11 Special General Runoff will occur. If no candidate receives a majority of the votes,
12 however, the Special General Runoff will take place on the same date as the Primary
13 Election. The application of the Millionaires' Amendment's provisions to each of these
14 two scenarios is discussed below.

15 *Scenario 1 – No Special General Runoff: April 12 – June 6, 2006*

16 If one candidate wins the Special General Election and no Special General Runoff
17 takes place, then the Special General Election Cycle will end on April 11, 2006 and the
18 Primary Election Cycle will begin on April 12, 2006 for those candidates that participated
19 in the Special General Election. Accordingly, the Committee must dispose of all "excess

⁴ For House candidates, the proportionality provision limit is reached when the sum of increased contributions received and coordinated party expenditures made pursuant to the Millionaires' Amendment equals the opposition personal funds amount. *See* 11 CFR 400.31(e). At that point, candidates and their authorized committees must stop accepting increased contributions and party committees must stop making additional coordinated party expenditures on the candidate's behalf. *Id.*

1 contributions”⁵ it received during the Special General Election Cycle within 50 days after
2 April 11, 2006. *See* 2 U.S.C. 441a-1(a)(4) and 11 CFR 400.51. It may not spend any of
3 these excess contributions on the Primary Election, or any other election, and it may not
4 seek to have any such excess contributions redesignated by the contributors for the
5 Primary Election or for any other election. *See* 2 U.S.C. 441a-1(a)(4); 11 CFR 400.50,
6 400.51, 400.52, 400.53, and 400.54.

7 Under 11 CFR 110.3(c)(3), any carryover of unused funds from one election cycle
8 to another (or from a previous Federal campaign committee to a current Federal
9 campaign committee) is a transfer, regardless of whether the candidate maintains
10 different committees or different campaign accounts for different elections. Any portion
11 of Ms. Busby’s expenditures from personal funds that was not used for expenses in the
12 Special General Election Cycle that is transferred to the Primary Election Cycle under 11
13 CFR 110.3(c)(3) will be considered an expenditure from personal funds for the Primary
14 Election. Ms. Busby and/or the Committee must use a reasonable accounting method
15 such as the one described in 11 CFR 110.3(c)(4) to determine the portion of the amount
16 transferred that constitutes the candidate’s personal funds.

17 In this instance, the date the expenditure from personal funds is made would be
18 the date the funds are transferred to the Primary Election Cycle, *i.e.* April 12, 2006. If the
19 aggregate of the transferred funds and other expenditures from personal funds for the
20 Primary Election Cycle exceeds \$350,000, Ms. Busby will trigger the Millionaires’
21 Amendment for the Primary Election and must file an Initial Notification on FEC Form

⁵ “Excess contributions” are contributions made at the increased limit but not spent in connection with the election to which they relate. *See* 2 U.S.C. 441a-1(a)(4) and 11 CFR 400.50.

1 10 with the Commission and with all opposing candidates in the Democratic Primary
2 Election. This Initial Notification must be filed by April 13, 2006. *See* 11 CFR
3 400.21(b) and 400.24(b).

4 On April 12, 2006, the Committee should check the Commission's website to see
5 if any of Ms. Busby's Democratic opponents in the Primary Election who did not also
6 participate in the Special General Election filed any FEC Form 10s with the Commission
7 between November 3, 2004 and April 11, 2006. If any such opposing candidates did file
8 one or more FEC Form 10s, the Committee will obtain constructive notification of such
9 filings as of the date on or after April 12, 2006 that it downloads the opposing candidate's
10 FEC Form 10s. Once it downloads the form(s), the Committee should determine whether
11 it is eligible for increased contributions from individuals for the Primary Election Cycle.
12 Political party committees cannot make coordinated party expenditures in connection
13 with a primary election campaign, only in connection with a general election campaign.
14 *See* 2 U.S.C. 441a(d) and 11 CFR 400.30(c)(1).

15 The Primary Election Cycle is a separate and distinct election cycle from the
16 Special General Election Cycle. Thus, in calculating the opposition personal funds
17 amount, expenditures from personal funds made during the Special General Election
18 Cycle by any candidate running in the Special General Election must not be aggregated
19 with expenditures from personal funds made during the Primary Election Cycle, unless
20 unused personal funds are transferred from the Special Election Cycle to the Primary
21 Election Cycle. Additionally, in calculating the opposition personal funds amount for the
22 Primary Election Cycle, the Committee must include the gross receipts as reported in

1 FEC Form 3Z-1 in the 2005 Year End reports. *See* 11 CFR 400.10(a)(3). Ms. Busby and
2 the Committee must comply with the Millionaires' Amendment regulations set forth in
3 11 CFR part 400 as they normally would in any primary election.

4 *Scenario 2 – Special General Runoff & Primary: April 12 – June 6, 2006*

5 If no candidate receives a majority of votes in the Special General Election on
6 April 11, 2006, California will hold a Special General Runoff on June 6, 2006, the same
7 date as the Primary Election. Under this scenario, between April 12, 2006 and June 6,
8 2006, candidates participating in both the Special General Runoff and the Primary
9 Election will be in two simultaneous election cycles: the continuation of the Special
10 General Election Cycle and the Primary Election Cycle. Because those candidates would
11 be running during two election cycles at the same time, expenditures from personal funds
12 during this period would be expenditures for both elections. Thus, those expenditures
13 must be split evenly between the two election cycles for purposes of the Millionaires'
14 Amendment.

15 Consequently, if Ms. Busby participates in both the Special General Runoff and
16 the Primary Election, her expenditures from personal funds between April 12, 2006 and
17 June 6, 2006 will be divided evenly between the Special General Election Cycle and the
18 Primary Election Cycle. Half of those expenditures must be aggregated with all of the
19 expenditures from personal funds she previously made during the Special General
20 Election Cycle beginning on November 3, 2004. The Committee must file the
21 appropriate notification that may result from the aggregation (*e.g.* Initial Notification or
22 Additional Notification). Additionally, if the other half of the expenditures from personal

1 funds that is considered expenditures for the Primary Election exceeds \$350,000, the
2 Committee must file FEC Form 10 with the Commission and with each opposing
3 candidate in the Democratic Primary Election. That half of the expenditures from
4 personal funds must also be used to calculate the opposition personal funds amount with
5 regard to the Primary Election. This calculation must also take into account the gross
6 receipts amounts on FEC Form 3Z-1 filed with the 2005 Year End reports.

7 If Ms. Busby's opponent in the Special General Runoff makes expenditures from
8 personal funds during the Special General Runoff that are considered expenditures for the
9 Special General Runoff (*see* above), the Committee should treat such expenditures the
10 same as any other expenditures from personal funds made by that opposing candidate
11 during the Special General Election Cycle. In calculating the opposition personal funds
12 amount, the Committee must aggregate all expenditures from personal funds for the
13 Special General Election Cycle, including expenditures for the Special General Runoff.
14 However, the Committee should not include gross receipts amounts in this calculation
15 because these amounts are attributed entirely to the Primary Election and not to the
16 Special General Runoff.

17 In addition to the requirements discussed above, Ms. Busby and the Committee
18 must comply with all other applicable requirements of the Millionaires Amendment
19 regulations. These requirements include disposal of excess contributions after the
20 Primary Election and repayment of personal loans. *See e.g.*, 2 U.S.C. 441a-1(a)(4) and
21 441(a)(j); *see also* 11 CFR part 400, subpart E and 11 CFR 116.11 and 116.12.

1 This response constitutes an advisory opinion concerning the application of the
2 Act and Commission regulations to the specific transaction or activity set forth in your
3 request. *See* 2 U.S.C. 437f. The Commission emphasizes that if there is a change in any
4 of the facts or assumptions presented, and such facts or assumptions are material to a
5 conclusion presented in this advisory opinion, then the requestor may not rely on that
6 conclusion as support for its proposed activity.

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9 Sincerely,

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14 Michael E. Toner
15 Chairman
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19